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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DEC 21 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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)
Petition of the State Independent Alliance and)
the Independent Telecommunications Group) WT Docket No. 00-239
for a Declaratory Ruling That the Basic)
Universal Service Offering Provided by)
Western Wireless in Kansas is Subject to)
Regulation as Local Exchange Service)

OPPOSITION OF WESTERN WIRELESS

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December 21, 2000

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EXECUTIVE SUMMARY

The Commission should reject the Petition and confirm that Western Wireless' cellular service, of which Basic Universal Service ("BUS") is only one of several service offerings, is commercial mobile radio service ("CMRS"). First, the BUS service option cannot be assessed in isolation from Western Wireless' overall cellular service, which is clearly CMRS. The special customer premise equipment ("CPE") used by customers who choose to subscribe to BUS does not distinguish the BUS option from the other packaged options Western Wireless offers customers, nor do the rate structure and rate levels associated with BUS.

Second, even if the Commission chooses to conduct a "case-by-case" assessment of BUS standing alone, it should find, based on factors it has already identified as relevant to such analyses, that BUS is a mobile service. BUS is provided using equipment that "is capable of being moved" and "ordinarily does move." Moreover, BUS is "incidental," "ancillary," or "auxiliary" to Western Wireless' conventional cellular service, and therefore falls within the category of services that the FCC has long categorized as CMRS.

Finally, sound public policy requires the Commission to encourage mobile wireless carriers such as Western Wireless to introduce services like BUS that are intended to compete with incumbent landline monopolists. The Commission can achieve this objective by continuing to treat these offerings as CMRS, as the law requires.

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OPPOSITION OF WESTERN WIRELESS

Western Wireless Corporation ("Western Wireless") submits that all of its cellular offerings in Kansas, including Basic Universal Service ("BUS"), are commercial mobile radio service ("CMRS") under Section 332 of the Communications Act of 1934, as amended ("Act"). 1/ Therefore, the Commission should reject the Petition for Declaratory Ruling ("Petition") filed by the State Independent Alliance and the Independent Telecommunications Group ("Independents"). 2/

We show below that the Petition is entirely without merit. Western Wireless is a CMRS carrier, operating under FCC cellular licenses in Kansas and 18 other states. Western Wireless offers a wide variety of service options, including a

1/ 47 U.S.C. § 332.

2/ See Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Western Wireless' Basic Universal Service in Kansas is Subject to Regulation as Local Exchange Service*, WT Docket No. 00-239, DA 00-2622 (rel. November 21, 2000).

range of service packages with different rate levels, rate structures, and customer equipment options. BUS is just one of those packaged options, and is not a stand-alone “service” for purposes of applying the statutory definition of CMRS. Moreover, Western Wireless’ service offerings in Kansas, including BUS, utilize customer equipment that meets the applicable definitions of a “mobile station” in that the equipment is “capable of being moved” and “ordinarily does move.” 3/ Finally, the Commission should recognize the Independents’ Petition for what it is – another in a long series of efforts to impede Western Wireless’ competitive entry into the universal service markets in which incumbent local exchange carriers (“ILECs”) hold monopolies. The FCC should reject these efforts, as have the Kansas Corporation Commission and other state commissions that have addressed these issues.

I. BACKGROUND: BASIC UNIVERSAL SERVICE IS ONE OF WESTERN WIRELESS’ MANY CELLULAR SERVICE PACKAGES

Western Wireless provides cellular telecommunications service under the brand name “Cellular One” in Kansas and 18 other western states under licenses issued by the FCC to the company’s various wholly-owned subsidiaries. Because its FCC licenses cover primarily rural areas, Western Wireless focuses on serving the telecommunications needs of rural customers, include both their conventional cellular needs, and their basic telephone needs. Western Wireless currently serves more than 1 million subscribers throughout its 19-state service area.

3/ 47 U.S.C. § 153(28). The wireless access unit is indisputably “capable of operation while in motion” consistent with Section 22.99 of the Commission’s rules. 47 C.F.R. § 22.99.

Western Wireless offers a variety of cellular service packages with different rate structures, including BUS as well as many others. The cellular telecommunications provided under BUS and all other service packages is transmitted over Western Wireless' cellular radio frequencies (824 MHz -899 MHz) using cellular infrastructure consisting of towers, transmitters, receivers, and other equipment deployed throughout the company's licensed service areas.

Western Wireless' conventional cellular service plans in Kansas are largely usage sensitive, require a minimum one-year service commitment, and range in price from \$24.99 per month for a plan that includes 75 free minutes of usage to \$129.99 per month for a plan that includes 1300 free minutes of usage. The inclusion of long distance, the extent of roaming charges for cellular calls outside the home calling area, and the promotional inclusion of specified handsets all vary by service plan. In addition, Western Wireless' BUS service package, priced at \$14.99 per month, features unlimited local calling, and an expanded home calling area that gives customers savings on toll charges for calls to neighboring communities. As of December 1, 2000, Western Wireless had more than 45,000 conventional cellular customers and 386 BUS customers in Kansas, such that BUS accounts for 0.857 percent of Western Wireless' cellular customer base in the state.

The sole technological difference between Western Wireless' conventional and BUS cellular service packages is the type of customer premises

equipment (“CPE”) used to access the wireless network. 4/ Most of Western Wireless’ subscribers purchase conventional cellular handsets in order to interface with Western Wireless’ cellular network. The size, weight, mobility, and battery life of these conventional cell phones differ depending on the model purchased. Small hand-held pocket phones are highly mobile, small in size and weight, and ideally suited for areas in close proximity to cell sites. Bag phones are less mobile, bigger in size and weight, and best-suited for more rural areas where cell sites are few and far between.

Customers who select the BUS service option obtain access to the Western Wireless cellular network using CPE in the form of a Phonecell SX3i wireless access unit manufactured by the Telular Corporation. The Telular unit is mobile like other cellular CPE, is approximately the size of a laptop computer, weighs 4.6 pounds, and is powered by battery or A/C power. At 3 watts, the unit is more powerful than conventional cellular hand-held CPE. An optional high-gain antenna can be used to further maximize signal strength. The Telular unit simulates “dial-tone,” thereby allowing customers to use the telephone handset of their choice, fax machines, answering machines, or other peripheral devices.

Western Wireless’ BUS service package is the cornerstone of the company’s universal service offerings. Western Wireless’ ability to provide a service

4/ All of Western Wireless’ cellular offerings, including BUS, use the same antennae, cell sites, towers, trunk lines, mobile switching center, and inter-connection facilities – in fact, Western Wireless’ network facilities cannot distinguish between the types of CPE a subscriber may be using.

package that consumers will view as comparable to the basic telephony offered by ILECs, throughout the company's predominantly rural service territory, makes BUS the ideal vehicle for introducing competitive universal service to rural areas. 5/ As such, Western Wireless has obtained designation as an ETC in Kansas and nine other states, based on a demonstration that it meets the requirements set forth in the Act, the FCC's rules, and any applicable state requirements to be designated an ETC. 6/ Six of these commissions have further found that in areas served by rural telephone companies, Western Wireless' designation as an additional ETC serves the public interest. 7/

5/ For example, since 1994, Western Wireless' customers in Reese River and Antelope Valley, Nevada, have been using wireless local loop CPE for their basic telephone service. Since January 1999, Western Wireless' customers in Regent, North Dakota, have been using the wireless local loop CPE as a competitive local telephone service offering. Moreover, there are customers of Western Wireless throughout its 19-state cellular service area that use the wireless local loop CPE for their special needs, such as vacation homes, construction sites, and other places where landline service does not exist or is not economically feasible.

6/ California, Iowa, Kansas, Minnesota, Nebraska, Nevada, North Dakota, Oklahoma, Texas, and Utah have designated Western Wireless as an ETC. South Dakota is the only state commission that has rejected a Western Wireless ETC petition; as the Commission is aware, that decision was reversed on appeal and is currently pending appeal to the state Supreme Court. *Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd 15168, 15169 ¶ 3 (2000). Western Wireless also currently has petitions for ETC designation pending before state commissions in Colorado, New Mexico, South Dakota, and Wyoming, and before the FCC for the Crow Reservation in Montana.

7/ Iowa, Minnesota, Nebraska, Nevada, Oklahoma and Texas have found it in the public interest to designate Western Wireless as an ETC in rural telephone company study areas. In California, Western Wireless did not seek designation in any rural telephone company service area, and in Kansas, Western Wireless'

II. WESTERN WIRELESS' BASIC UNIVERSAL SERVICE QUALIFIES AS COMMERCIAL MOBILE RADIO SERVICE

The Commission should reject the Petition and confirm that Western Wireless' cellular service, of which BUS is only one of several service offerings, qualifies as CMRS, for three reasons. First, the BUS service option cannot be assessed in isolation from Western Wireless' overall cellular service, which is clearly CMRS. The special CPE used by BUS customers is not a relevant factor to distinguish the BUS option from the other packaged options the company offers.

Second, even if the Commission chooses to conduct a "case-by-case" assessment of BUS standing alone, it should find, based on factors it has already identified as relevant to such analyses, that BUS is a mobile service. BUS is provided using equipment that "is capable of being moved" and "ordinarily does move." Therefore, any analysis of BUS as a distinct offering should reach the conclusion that it is "incidental," "ancillary," or "auxiliary" to Western Wireless' conventional cellular service. As such, BUS clearly falls within the category of services that the FCC has categorized as CMRS since at least 1994.

Finally, as we show below, there is no merit in the Independents' policy arguments in support of their Petition. To the contrary, we show that, when mobile wireless carriers such as Western Wireless introduce services like BUS that

petition is pending before the Kansas Corporation Commission, which has already determined that competition in rural telephone company service areas is in the public interest. Only North Dakota and Utah have denied Western Wireless ETC status for rural telephone company service areas, and those decisions are on appeal.

are intended to compete with incumbent landline monopolists, sound law and public policy counsels in favor of CMRS treatment of those offerings.

As a necessary backdrop to these legal arguments, we provide below an analysis of the relevant statutory language and the precedents of the FCC and state commissions. The legal argument follows.

A. Applicable Statutes and Precedents

1. The Communications Act of 1934, As Amended

The Act defines CMRS as any “mobile service” that is provided for profit and makes interconnected service available to the public. 8/ There is no question that all of Western Wireless’ cellular service offerings are interconnected to the public switched network and are provided to the public for profit. The issue raised here is whether its services constitute “mobile service.” The Act defines this term as radio communication involving “mobile stations.” 9/ In turn, the Act defines “mobile station” as “a radio-communication station capable of being moved and which ordinarily does move.” 10/ CMRS services are exempt from state rate and entry regulation. 11/

8/ 47 U.S.C. § 332(d)(1); 47 C.F.R. § 20.3.

9/ 47 U.S.C. § 153(27) (“The term ‘mobile service’ means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves . . .”).

10/ 47 U.S.C. § 153(28). Consistently, Section 22.99 of the FCC’s rules defines a “mobile station” as “[o]ne or more transmitters that are capable of operation while in motion.” 47 U.S.C. § 22.99.

11/ 47 U.S.C. § 332(c)(3)(A).

2. FCC Precedents

In the 1994 *CMRS Second Report and Order*, the FCC determined that auxiliary or ancillary fixed services offered by mobile licensees, as well as services having both fixed and mobile capabilities, fall within the statutory definition of mobile services. ^{12/} Specifically, the Commission held that “[s]ervices provided through dual-use equipment . . . capable of transmitting while the platform is moving, are included in the mobile services definition.” ^{13/} By contrast, the Commission held that certain “services provided to or from a transportable platform that cannot move when the communications service is offered should not be included within the definition of mobile service.” ^{14/}

In the 1996 *CMRS Regulatory Flexibility First Report and Order*, the Commission reiterated its conclusion that “services having both fixed and mobile capabilities, e.g., services provided through dual-use equipment, fall within the statutory definition” of mobile service. ^{15/} While the Commission granted CMRS providers additional flexibility to offer fixed services and sought comment on the

^{12/} *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1424-25, ¶¶ 36, 38 (1994) (“*CMRS Second Report and Order*”).

^{13/} *Id.* at 1425, ¶ 38.

^{14/} *Id.*

^{15/} *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965, 8969 ¶ 7 (1996) (“*CMRS Regulatory Flexibility First Report and Order*”).

regulatory status of those fixed services, it also stated that it did not intend to change its “regulatory treatment of fixed services that have been provided by CMRS providers under our prior rules [as] subject to CMRS regulation.” 16/ The FCC stated that, under those prior rules, “a fixed service that is ancillary to a mobile service” (or “auxiliary” or “incidental”) clearly would be treated as CMRS, but sought comment about the appropriate treatment of other fixed services, such as “a wholly fixed service that may use no mobile stations.” 17/

More recently, in the *CMRS Regulatory Flexibility Second Report and Order*, the Commission declined to establish either a bright-line test or a rebuttable presumption to determine whether a particular service provided by a wireless carrier is CMRS, and instead decided to make such decisions on a case-by-case basis. 18/ Notably, however, the Commission did not reverse or modify its earlier decision regarding the CMRS status of hybrid fixed-mobile services and fixed services that are incidental or ancillary to mobile services. Nor did the Commission modify its existing rules that classify *all* cellular services subject to Part 22 of the

16/ *Id.* at 8985, ¶ 48.

17/ *Id.* at 8987, ¶ 51.

18/ *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, Second Report and Order, FCC 00-246, ¶¶ 7-8 (rel. July 20, 2000) (“*CMRS Regulatory Flexibility Second Report and Order*”).

Commission's rules as mobile services and CMRS. 19/ Also, it did not elaborate on the factors to be considered in the case-by-case analysis, although it had set forth a list of potentially relevant factors in the Notice of Proposed Rulemaking that was the basis for the *CMRS Regulatory Flexibility Second Report and Order*. 20/

3. State Commission Precedents

While the FCC has not yet conducted a case-by-case analysis pursuant to the *CMRS Regulatory Flexibility Second Report and Order*, a number of state commissions have had the opportunity to conduct such a case-specific analysis in the exact context of whether Western Wireless' BUS qualifies as CMRS. No state commission that has addressed the issue has decided to regulate BUS as anything other than CMRS. In particular, the North Dakota Public Service Commission held that Western Wireless' BUS service is CMRS, in cases addressing the same argu-

19/ 47 C.F.R. §§ 20.7(a) and 20.9(a)(7). The Commission did, however, eliminate the requirement that CMRS licensees notify the Commission before introducing incidental services. 47 C.F.R. § 22.323.

20/ *CMRS Regulatory Flexibility First Report and Order*, 11 FCC Rcd at 8988, ¶ 54 ("Possible factors may include: the relative mobility of mobile stations used in conjunction with the fixed service; whether the fixed service is part of a larger package which includes mobile services or is offered alone; the size of the service area over which the fixed wireless service is provided; the amount of mobile versus fixed traffic over the wireless system; whether the fixed service is offered over a discrete block of spectrum separate from the spectrum used for mobile services; the degree to which fixed and mobile services are integrated; and whether customers perceive the service to be a fixed service. Part of any analysis of customer perception may also include consideration of how the service is marketed by the CMRS provider to potential customers.")

ments as those raised by the Independents in the present Petition, and based on an assessment of facts that are virtually indistinguishable from those at issue here. 21/

In the North Dakota case, a rural ILEC facing competition for the first time from Western Wireless' BUS offering, claimed that Western Wireless needed a certificate of public convenience and necessity to provide that service utilizing wireless local loop technology. Following an evidentiary hearing, the North Dakota Commission undertook an analysis of the FCC's decisions as applied to Western Wireless' service offering using the Telular wireless access unit. The North Dakota Commission concluded that BUS "has mobile capabilities and is therefore a mobile service" and is exempt from state entry and rate regulation. 22/

Other state commissions have similarly declined to regulate the rates and entry of Western Wireless, specifically finding that Western Wireless is not required to obtain a competitive local exchange carrier ("CLEC") certificate as a

21/ *Western Wireless Corp. v. Consolidated Telephone Cooperative, Inc. Complaint*, NDPSC Case No. PU-1564-99-17, Findings of Fact, Conclusions of Law and Order (August 31, 1999) ("*North Dakota Order*"), *aff'd on remand*, Findings of Fact, Conclusions of Law and Order on Remand (Nov. 22, 2000) ("*North Dakota Remand Order*"), *appeal pending*. Copies of these decisions are attached as Exhibits A and B.

22/ *North Dakota Order*, Findings of Fact, at ¶ 38; Conclusions of Law, ¶¶ 3-5. The North Dakota Commission recently reaffirmed this conclusion, finding that evidence purporting to show Western Wireless' intent to discourage subscribers from using BUS on a mobile basis did not "create, eliminate or revise the technical capabilities" of the service. *North Dakota Remand Order*, Findings of Fact, ¶¶ 5-7.

condition to being designated an ETC. ^{23/} These states, although not conducting a detailed review of whether Western Wireless' BUS offering is CMRS, have recognized the preemptive effect of Section 332(c)(3) of the Act and refused to impose any certification requirements on Western Wireless or other wireless ETCs. For instance, the Kansas Corporation Commission concluded "that Western Wireless and Sprint PCS are not required to obtain a certificate of convenience and authority as a condition to being designated ETCs" for state and federal purposes. ^{24/}

B. Basic Universal Service Cannot Be Analyzed in Isolation From Western Wireless' Overall Cellular Service

It is uncontested that Western Wireless' cellular service is CMRS. The BUS cellular offering is inextricably linked with the other types of cellular service offerings by Western Wireless. All of Western Wireless' cellular service packages, including BUS (which makes up only 0.857% of the company's cellular customers in Kansas), are provided using the same cellular spectrum, and the same antennas, base stations, switches, and other network facilities. The Commission therefore

^{23/} See, e.g., *Order # 6 Granting Sprint PCS and Western Wireless ETC Designation in Non-Rural Telephone Company Wire Centers for Federal Universal Service Support*, Docket No. 99-GCC2-156-ETC, 2-4 (Kansas Corporation Commission Jan. 19, 2000) ("KCC Order #6"); *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier*, PUC Docket Nos. 22289 and 22295, Preliminary Order at 9 (June 7, 2000), *aff'd*, Final Order at 22, Conclusions of Law ¶ 8 (Oct. 2000); *Application of WWC Licence LLC d/b/a Cellular One to be Designated as an Eligible Telecommunications Carrier in the State of Nevada*, Docket No. 00-6003 at 2-3 (Nevada PUC Aug. 17, 2000) (exempting Western Wireless from ETC certification requirement); *In re: WWC License LLC, d.b.a. CellularOne*, Docket No. 199 IAC 39.2(4) at 11 (Iowa Utils. Bd. Nov. 21, 2000).

^{24/} See generally *Kansas Order #6*.

should reject the Independents' argument that BUS should be considered apart from, and regulated differently than, the rest of Western Wireless' cellular service offerings.

Like most CMRS providers, Western Wireless offers a range of service packages using its cellular licenses and infrastructure. These service packages feature a range of rate structures and rate level options, similar to those offered not only by other CMRS providers, but by ILECs and CLECs as well. Many of Western Wireless' cellular service packages, including BUS, are bundled with various types of customer equipment. ^{25/} However, the fact that a carrier offers multiple service packages with differing rate structures, rate levels, and other features and functions, does not mean that each package is a different "service" (in the Title III sense of the word) warranting separate regulatory treatment. Notably, nothing in the Act or the legislative history of Section 332 suggests that the Commission should view a CMRS provider's various offerings as separate "services." In this case, it is clear that Western Wireless' BUS offering is a component of its overall cellular service offerings under Part 22 of the Commission's rules. ^{26/}

^{25/} See *supra* at Section I. Of course, CMRS carriers are permitted to bundle CPE with service. See *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028 (1992); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 16340 (1999).

^{26/} See 47 C.F.R. §§ 20.7(a) and 20.9(a)(7) (classifying *all* cellular services subject to Part 22 of the Commission's rules as mobile services and CMRS).

A similarly holistic view has applied in other contexts where a carrier offers within its range of related services one offering that is somewhat different in its features and the way it is marketed. For example, the Commission determined that GTE's DSL Solutions-ADSL Service was a special access service properly tariffed at the federal level. 27/ The Commission reached this decision even though GTE designed the service to compete in markets different from the rest of its federally tariffed access service offerings, and the ADSL Service was directed to a different class of customers and used for a different purpose. Specifically, while most of GTE's federally tariffed services were provided to interexchange carriers ("IXCs") to allow them to provide long distance service, ADSL Service was directed to Internet service providers ("ISPs") to allow them to provide Internet access service. 28/ Nonetheless, the FCC treated GTE's ADSL Service as merely one of the company's many offerings provided under its access service tariff.

The same outcome should prevail here. Even though BUS uses different CPE and is marketed differently from Western Wireless' other cellular offerings, BUS is no less a part of Western Wireless' cellular service than ADSL is a part of GTE's special access services. Likewise, there is no basis for treating the BUS service package differently or distinctly from Western Wireless' overall cellular service.

27/ *GTE Operating Companies; GTOC Tariff No. 1; GTE Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998).

28/ *Id.* at 22471-72, ¶¶ 9-10.

As explained previously, cellular service consists of different types of offerings using different types of CPE. Some cellular customers use hand-held pocket cellphones. Others use larger, less-mobile “bag” cellphones, and some use cellular car phones. Still others use the Telular unit. Clearly technological developments in cellular service do not justify imposing different regulations based upon the type of CPE used by individual customers.

C. Even if Considered in Isolation, Western Wireless’ Basic Universal Service Qualifies as Commercial Mobile Radio Service

1. The Commission’s Precedents Favor Continued Treatment of Basic Universal Service as Commercial Mobile Radio Service

The BUS service option has mobile attributes – and therefore must be characterized as a mobile service. No one denies that the service, like many other cellular service offerings, is capable of being used in stationary applications; but the Telular CPE packaged with Western Wireless’ BUS is also clearly capable of being moved, as the Independents concede. ^{29/} Therefore, the BUS offering is clearly included among the “[s]ervices provided through dual-use equipment . . . capable of transmitting while the platform is moving, [that] are included in the mobile services definition.” ^{30/} The FCC affirmed in the *CMRS Regulatory Flexibility* proceeding that “services having both fixed and mobile capabilities, *e.g.*, services provided

^{29/} Petition at 12.

^{30/} *CMRS Second Report and Order*, 9 FCC Rcd at 1425, ¶ 38.

through dual-use equipment, fall within the statutory definition” of mobile service. 31/

BUS also could be considered a form of service that is “incidental,” “ancillary,” or “auxiliary” to Western Wireless’ conventional cellular service offerings. For example, BUS satisfies all three of the criteria for “incidental” services under Section 22.323 of the rules. 32/ Specifically, the provision of BUS: (a) does not raise the costs and charges for subscribers who opt not to use it; (b) does not diminish the growth, availability, or quality of the conventional cellular service options; and (c) is in other respects consistent with the Act and FCC rules and policies. As an authorized “incidental,” “ancillary,” or “auxiliary” service, BUS falls squarely within the category of services classified as CMRS pursuant to the 1994 *CMRS Second Report and Order*, and whose status was not changed or addressed by either the 1996 *First Report and Order* or the July 2000 *Second Report and Order* in the *CMRS Regulatory Flexibility* proceeding.

Finally, even though the Commission declined to adopt its proposed rebuttable presumption that any wireless service provided under a CMRS license would be considered CMRS, some of the factors that the FCC proposed for deciding

31/ *CMRS Regulatory Flexibility First Report and Order*, 11 FCC Rcd at 8969, ¶ 7.

32/ 47 C.F.R. § 22.323(a), (b), and (c).

whether the presumption was successfully rebutted are instructive here. ^{33/} For example, the Commission proposed to examine whether the fixed service is part of a larger service package which includes mobile services or is offered alone. ^{34/} As discussed above, Western Wireless provides BUS as one of a range of cellular service packages, all the rest of which are undoubtedly mobile. Moreover, the customer equipment packaged with BUS has mobile applications.

The Commission also proposed considering “the amount of mobile versus fixed traffic” over the CMRS provider’s wireless system, and whether “the fixed service is offered over a discrete block of spectrum” separate from that used for mobile service. ^{35/} As noted above, Western Wireless carries far more non-BUS than BUS traffic on its wireless system (BUS makes up only 0.857% of the company’s Kansas customer base), and Western Wireless uses the same CMRS spectrum – in fact, the same cellular channels – to provide both BUS and non-BUS service packages. The Commission also listed as potential factors “the degree to which fixed and mobile services are integrated” and “how the service is marketed” to potential customers. ^{36/} To the extent that the BUS customer equipment has stationary, in-transit and away-from-home capabilities, the offering integrates

^{33/} *CMRS Regulatory Flexibility First Report and Order*, 11 FCC Rcd at 8988, ¶ 54.

^{34/} *Id.*

^{35/} *Id.*

^{36/} *Id.*

stationary and mobile components and is marketed to highlight them. In sum, BUS clearly should be treated as CMRS.

2. The Telular CPE Does Not Preclude Basic Universal Service From Being a Mobile Service

The core of the Independents' argument that BUS is not CMRS is based on the following points: (1) the Telular device is cumbersome; (2) it is not as easy to tote around or use in motion as handheld cellular phones; and (3) it is typically powered by A/C voltage from a wall outlet. 37/ They concede that the Telular CPE is capable of being moved, but contend that its size and other characteristics mean that it does not ordinarily move. 38/

But the fact that one type of CPE, among the many that may be bundled with cellular service, is more cumbersome than others does not defeat the CMRS status of a carrier's cellular service. For example, there can be no doubt about the CMRS status of cellular service provided to larger cell phones physically mounted on cars, or "bag phones" the size of a small briefcase. Similarly, mobile telephony provided by satellite is classified as CMRS, 39/ even though the equipment used by satellite telephone customers is unwieldy and nowhere near as compact, streamlined and self-contained as conventional handheld cell phones. Nor does the relatively limited battery capacity of the Telular unit (compared to hand-

37/ Petition at 8-10.

38/ *Id.* at 12.

39/ *CMRS Second Report and Order*, 9 FCC Rcd at 1457-58, ¶ 109.

held cellphones) necessarily have a legal consequence. Analog bag phones likewise have a very limited battery capacity, and there is no question that cellular service provided to bag phones is CMRS.

Contrary to the Independents' analogy between BUS and basic exchange telephone radio service ("BETRS"), the mobile Telular unit is nothing like the fixed wireless equipment used with BETRS, which the Commission has classified as non-CMRS. 40/ The Commission has recognized that BETRS subscriber units may be located up to a mile from the customer premises, are usually mounted on a telephone pole separate from the subscriber's house, may be contained in a protective cabinet to which the subscriber has no access, and often serve multiple customers. 41/ By contrast, the Telular unit used by Western Wireless' BUS customers is self-contained and can be moved anywhere in the customers' premises, vehicles, or anywhere else the customer chooses to use it.

Neither the terminology a carrier uses to market a service to consumers, nor that used by regulators as shorthand for describing it, are determinative of a service's CMRS status. 42/ Western Wireless' use of terminology such as "wireless local loop service," "fixed Wireless Residential Service" or "Fixed Wireless

40/ Petition at 10-11 (citing *CMRS Second Report and Order*, 9 FCC Rcd at 1425, ¶ 38).

41/ *Status of Radio and Antenna Equipment Used in the Basic Exchange Telephone Radio Service*, Memorandum Opinion and Order, 4 FCC Rcd 2224, 2224-25, ¶¶ 4, 7 (1989).

42/ Petition at 12-14.

Terminal” does not change the nature of the service. 43/ Rather, this is merely promotional language to stress to consumers that the BUS package is designed to be competitive with basic ILEC service packages. What a carrier *names* its service is neither contemplated as a factor by the statute, nor does it logically suggest itself as one.

The central point is that Western Wireless anticipates that its BUS customers ordinarily will move their WLL CPE when using BUS. For example, Western Wireless’ brochure reminds its BUS customers to “use your phone safely when driving.” 44/ The same brochure also tells customers that, in the event they are experiencing signal problems, they should simply move the unit. 45/ In fact, for BUS customers who regularly find themselves in areas where phone lines do not run, the ability to pack up and take the Telular unit with them may be one of BUS’s most valued service features. The fact that the product design is convenient to use while stationary in no way detracts from the fact that customers may ordinarily

43/ Cf., *North Dakota Remand Order*, Findings of Fact, ¶ 5.

44/ See Cellular One, Welcome Guide, Wireless Residential Services, back cover (1999) (“WRS Welcome Guide”); see also Petition, Attachment D at 63 (providing testimony of James H. Blundell of Western Wireless, responding affirmatively to KCC Commissioner Claus’ question “Does that mean you could put this unit in your car and drive all over the country?”). A copy of the WRS Welcome Guide is attached hereto as Exhibit C.

45/ WRS Welcome Guide at 7.

move the Telular unit. Nor does the fact that WLL CPE simulates the feel of local exchange service negate the unit's capability for movement nor CMRS status. 46/

In sum, there is nothing about BUS or the Telular CPE that would preclude subscribers from ordinarily using the unit in mobile operation. The fact is that consumers are mobile and increasingly expect to be able to use their electronic equipment, from phones to laptop computers, in a mobile context. It therefore stands to reason that if consumers have a piece of equipment that is capable of being used while moving, these consumers ordinarily will do so.

D. Law and Public Policy Considerations Strongly Favor Classifying Western Wireless' Competitive Universal Service Offerings as Commercial Mobile Radio Service

The Commission should dismiss the Independents' anti-competitive argument that Western Wireless' BUS offering should be subject to the same requirements that apply to ILECs, including certification, equal access to long distance, and minimum data rates. 47/ A careful examination of each of these arguments reveals that the Independents' real agenda is simply to preclude Western Wireless from competing with them.

46/ Moreover, the fact that Telular CPE used with BUS simulates dial-tone and allows customers to use familiar telephone handsets and other peripheral devices, Petition at 11-12, is irrelevant. Handheld cell phones could easily be equipped to simulate dial-tone, and some already offer the ability to attach peripheral equipment, such as modems, that traditionally use wireline telecommunications capabilities. There is no suggestion that the provision of such features makes the service provided on these cell phones non-CMRS, nor should there be. The same should hold true for larger equipment like the Telular units.

47/ Petition at 14-16.

First, the Independents' argument for entry regulation flies in the face of the public policy judgments made by Congress in passing Section 332(c)(3) of the Act, and by the Commission in the *CMRS Regulatory Flexibility* proceeding. Congress eliminated state entry regulation of CMRS carriers in light of the stringent FCC regulation of such carriers' entry, including the need to purchase spectrum at auction and/or stringent build-out requirements. ^{48/} Congress' intent was to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure" ^{49/} Moreover, the FCC eliminated any barriers to CMRS providers' ability to provide fixed services in the *CMRS Regulatory Flexibility First Report and Order*, so that superimposing an additional, superfluous level of state regulation on the introduction of such services would dramatically undercut the Commission's policy framework. ^{50/} There is thus absolutely no public policy

^{48/} 47 U.S.C. § 332(c)(3).

^{49/} House Report, Omnibus Budget Reconciliation Act of 1993, H.R. Rep. No. 103-111 at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

^{50/} The Commission concluded that "licensees should have maximum flexibility to provide fixed or mobile services or combinations of the two over spectrum allocated for CMRS services, including PCS, cellular, and SMR services In light of the dynamic, evolving nature of the wireless industry, we are concerned that regulatory restrictions on use of the spectrum could impede carriers from anticipating what services customers most need, and could result in inefficient spectrum use and reduced technological innovation. Allowing service providers to offer all types of fixed, mobile, and hybrid services in response to market demand will allow for more flexible responses to consumer demand, a greater diversity of services and combinations of services, and increased competition. This is consistent with the goals of the 1996 Act, which seeks to increase competition between the various providers of